

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES, in its own right and on
behalf of the Lummi Indian Nation

Plaintiff,

LUMMI INDIAN NATION

Plaintiff-Intervenor,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY, et al.,

Defendants.

No. C01-0047Z

ORDER AND JUDGMENT

THIS MATTER comes before the Court on a Joint Motion to Approve Settlement brought by plaintiff United States, plaintiff-intervenor Lummi Nation, and defendants Washington State Department of Ecology ("Ecology"), Whatcom County, the Georgia Manor Water Association, the Harnden Island View Water Association, and the Sunset Water Association (collectively, the "Water Associations"), and various property owners represented by Eugene Knapp of Barron Smith Daugert PLLC. By Order dated November 2, 2007, docket no. 1262, the Court conditionally approved the settlement and directed the

1 parties to file the final Settlement Agreement. Having now reviewed the final Settlement
2 Agreement, and all papers related thereto, the Court does hereby ORDER AND ADJUDGE:

3 (1) **Approval of Settlement Agreement.** The Court GRANTS the Joint Motion to
4 Approve Settlement, docket no. 1056, and APPROVES the final Settlement
5 Agreement, docket nos. 1264-1 through 1264-10 [hereinafter the “Settlement
6 Agreement”]. The “Case Area,” as that term is used in the Settlement Agreement, the
7 Court’s previous orders, and this Order and Judgment, means that portion of the
8 Lummi Reservation indicated in the legal description and map contained in Exhibit A
9 to the Settlement Agreement, docket no. 1264-2. From the date of entry of this Order
10 and Judgment, all groundwater use and regulation of groundwater use within the Case
11 Area shall be governed by the provisions of this Order and Judgment and the
12 Settlement Agreement. Any and all groundwater uses not consistent with the
13 requirements of this Order and Judgment and/or the Settlement Agreement, including
14 uses otherwise permitted by state and/or federal law, are hereby ENJOINED. All
15 parties, all persons, and all entities bound by this Order and Judgment, and all their
16 heirs, successors, and assigns, are hereby DIRECTED to take any and all actions
17 required by the Settlement Agreement and this Order and Judgment, and are hereby
18 ENJOINED from taking any actions inconsistent with the Settlement Agreement and
19 this Order and Judgment.

20 (2) **Allocation of Groundwater.** Pursuant to and subject to the terms of the Settlement
21 Agreement, Ecology may allocate up to 120 acre-feet per year of groundwater within
22 the Case Area. Any adjustments to the 120 acre-feet allocation resulting from land
23 transfers or other actions shall be made in accordance with the terms of the Settlement
24 Agreement. The Lummi Nation may authorize withdrawal of all groundwater in the
25 Case Area not subject to allocation by Ecology, provided that such withdrawal is
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1 subject to the Lummi Nation's commitment to serve non-Lummi water users under
2 other settlements or service agreements, and further provided that chloride levels
3 remain within an acceptable range, as measured and determined in accordance with
4 the terms of the Settlement Agreement. The Lummi Nation may use, and authorize
5 withdrawal of, such water for any legal purpose. For purposes of this Order and
6 Judgment, the "Lummi Nation" means the Lummi Nation, as well as the United States
7 in its capacity as trustee for the Lummi Nation and individual Indians for whom the
8 United States owns land in trust or restricted fee status.

9 (3) **Water Master.** A Water Master shall be appointed in the manner, and shall have the
10 authority, described in the Settlement Agreement. The budget for the Water Master
11 shall be established by agreement between the Lummi Nation and Ecology on an
12 annual basis, with input from the Water Master, and shall be funded as specified in
13 the Settlement Agreement. If the Lummi Nation and Ecology cannot agree on the
14 amount of the budget for a particular year, the amount of the budget shall be
15 determined by the Court. Nominations of candidates for the position of Water Master
16 shall be submitted via motion filed within ninety (90) days of the date of this Order
17 and noted by the moving party for the third Friday after filing and service.

18 (4) **Initiating Appeal.** Any person aggrieved by any action or order of the Water Master
19 may appeal to this Court. Such person shall file a Notice of Appeal and pay the filing
20 fee applicable for new civil actions. The Notice of Appeal shall briefly describe the
21 action or append a copy of the order of the Water Master to be reviewed, and it shall
22 contain the following language: "This appeal is from a decision of the Water Master
23 appointed by the Honorable Thomas S. Zilly, United States District Judge, pursuant to
24 the Settlement Agreement in *United States, et al. v. Department of Ecology, et al.*,
25 Case No. C01-0047TSZ." Within three (3) days after filing the Notice of Appeal, the
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1 appealing party shall serve a copy of the Notice of Appeal on Ecology, the Lummi
2 Nation, and any other person or entity that was a party to the dispute before the Water
3 Master. The appealing party shall also provide the Water Master with a copy of the
4 Notice of Appeal. If Ecology, the Lummi Nation, or any other person or entity that
5 was a party to the dispute before the Water Master wishes to be heard concerning the
6 merits of the appeal, then no later than ten (10) days after receipt of the Notice of
7 Appeal, such person or entity shall electronically file and serve on the appealing party
8 a Notice of Appearance.

9 (5) **Transmitting Record.** Within ten (10) days after filing a Notice of Appeal, the
10 appealing party shall electronically file the portions of the written record before the
11 Water Master that are germane to the Court's review of the Water Master's decision.
12 Such portion of the record shall have a cover page with the title "Appellant's Excerpt
13 of Record" and shall be paginated. Within ten (10) days after filing of the Appellant's
14 Excerpt of Record, any party that has filed a Notice of Appearance may submit
15 additional, relevant portions of the written record or a log identifying any portions of
16 the Appellant's Excerpt of Record that should be stricken and the basis for such
17 position. Additional portions of the written record, if any, shall be electronically
18 filed, shall have a cover page with the title "Respondent's Excerpt of Record," and
19 shall be paginated. If an Excerpt of Record exceeds fifty (50) pages in length, the
20 filing party shall also deliver a paper copy to the Clerk's Office clearly marked on the
21 first page with the words "Courtesy Copy of Electronic Filing for Chambers."

22 (6) **Briefs and Noting Date.** Within thirty (30) days after filing of a Notice of Appeal,
23 the appealing party shall electronically file and properly serve an opening brief, not to
24 exceed twelve (12) pages in length, identifying the alleged errors of the Water Master
25 and any relevant factual and/or legal authorities. The appealing party shall note the
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1 matter on the Court's motion calendar for the fourth Friday after filing and service of
2 the opening brief. Any party that has filed a Notice of Appearance may electronically
3 file and properly serve a responding brief, not to exceed twelve (12) pages in length,
4 by the Monday before the noting date. The appealing party may electronically file
5 and properly serve a reply brief, not to exceed six (6) pages in length, by the noting
6 date.

7 (7) **Time and Service.** With regard to the computation of time and the method of service,
8 the requirements of Fed. R. Civ. P. 5 and 6 and Local Rule CR 7(d)(3), as amended
9 from time to time, shall apply. Unless otherwise specified in this Order and
10 Judgment, service shall be made on any party that has filed a Notice of Appearance.
11 The appealing party shall be deemed to have filed a Notice of Appearance by filing
12 the Notice of Appeal. Extension or expediting of the deadlines imposed by
13 paragraphs 4, 5, and 6 of this Order and Judgment may be sought by motion noted for
14 consideration no earlier than three (3) judicial days after filing and service. Papers
15 opposing such motions shall be due on the noting date. No reply papers shall be filed
16 unless requested by the Court.

17 (8) **Review.** Any appeal shall be on the written record established before the Water
18 Master. The Court will apply the standard of review that governs in appeals from
19 final federal agency action under the Administrative Procedures Act. The Water
20 Master's decisions will not be disturbed unless they are arbitrary and capricious, an
21 abuse of discretion, unsupported by substantial evidence, or not in accordance with
22 law. The Court will evaluate the Water Master's interpretation of the Settlement
23 Agreement under a two-step process analogous to the procedure established by
24 *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The
25 Court will defer to the Water Master's factual findings if they are supported by
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substantial evidence, and the Court will review questions of law de novo. The final judgment of this Court, after review of the challenged action or order of the Water Master, may be appealed in the same manner and pursuant to the same rules and standards as any other judgment of a district court.

(9) **Scope of Order and Judgment.** This Order and Judgment shall be binding on all parties to this action, and on all their heirs, assigns, and successors in interest. This Order and Judgment applies only to groundwater in the Case Area; it has no effect on current or potential claims of any party to any other water source, except to the extent that such claims interfere with the exercise of groundwater rights described in the Settlement Agreement. This Order and Judgment shall not be construed in any way to create tribal jurisdiction as to any party or property where such jurisdiction would not otherwise exist.

(10) **Previous Settlements.** All settlements previously approved by the Court in this case are not affected by this Order and Judgment, and such settlements remain in full force and effect.

(11) **Continuing Jurisdiction.** The Court shall retain jurisdiction of this case to modify this Order and Judgment upon motion of the parties, to appoint a Water Master and to replace the same as might be necessary from time to time, to decide appeals from decisions of the Water Master, and to resolve disputes regarding the annual budget of the Water Master.

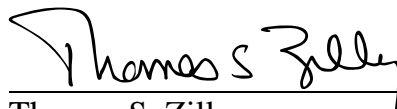
(12) **Prior Orders.** The Court VACATES its Order dated May 20, 2005, docket no. 779, and its Amended Order dated June 23, 2005, docket no. 794. Said Orders shall be of no preclusive effect as to any party, any person or entity bound by this Order and Judgment, or any of their heirs, successors, and assigns.

(13) **Costs and Fees.** All parties shall bear their own costs and attorney fees incurred in this matter.

1 (14) **Judgment.** Pursuant to Fed. R. Civ. P. 58, this document constitutes the Court's
2 separate and final judgment in this matter.

3 IT IS SO ORDERED.

4 DATED this 20th day of November, 2007.

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7 Thomas S. Zilly
8 United States District Judge
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